


Patrick M. Flatley
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

IN RE:)
)
PIN OAK PROPERTIES, LLC) **CASE NO.: 17-bk-00608**
Debtor.) **CHAPTER 11**
)

AGREED ORDER AUTHORIZING USE OF CASH COLLATERAL

Come now the Debtor, by its counsel, David M. Jecklin, and the secured creditor, General Acquisitions LLC, through its counsel, Michael R. Proctor, David M. Thomas, and Robert Louis Shuman, and stipulate and agree to the following regarding the use of cash collateral:

1. This Court has jurisdiction over this bankruptcy case, the parties, the property affected thereby, and this matter pursuant to 28 U.S.C. §§ 1334 and 157(b).
2. Venue of this case and this matter is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).
4. On June 7, 2017 (“Petition Date”), the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code with this Court.
5. The Debtor is the owner of the property formerly known as the Middletown Mall in White Hall, Marion County, West Virginia (“Mall Collateral”).
6. On June 16, 2017, the Debtor filed its Motion to Use Cash Collateral.
7. In the Debtor’s Motion to Use Cash Collateral it argued that if it is unable to

receive and use the cash collateral generated from tenants' monthly rental payments at the Mall Collateral during this bankruptcy to pay its financial obligations in the ordinary course of business it could be forced to terminate its operations. In short, without use of the cash collateral, the Debtor argued its ability to reorganize would be severely and adversely affected and its estate could suffer immediate and irreparable injury within the meaning of the Bankruptcy Code § 4001(b)(2).

8. A debtor in possession is authorized to use cash collateral in the ordinary course of its business operations under Sections 363(c)(2) and 1107 of the Bankruptcy Code, provided that upon a request of a party that has an interest in the cash collateral, the court shall condition such use as is necessary to provide adequate protection of such interest.

9. On June 19, 2017, secured creditor General Acquisitions filed a Partial Objection to the Debtor's Motion to Use Cash Collateral and outlined for this Court the history of the loan secured by the Debtor's assets, including the Mall Collateral, as explained in the Background below.

10. Additionally, in General Acquisitions' Partial Objection it stated a willingness to consent to the Debtor's use of the cash collateral from and after the Petition Date in accordance with terms and conditions to be agreed to by the parties and entered into an Agreed Order.

11. On June 20, 2017, this Court held a hearing during which it stated that the period for objections to the Debtor's Motion to Use Cash Collateral had not lapsed but that it would still hear from the Debtor's counsel and General Acquisitions' counsel regarding the Motion to Use Cash Collateral and the Partial Objection.

12. During the hearing, the Debtor agreed to incorporate into an Agreed Order the terms and conditions outlined below by General Acquisitions in its Partial Objection.

13. Also during the hearing, General Acquisitions agreed to receive monthly adequate protection payments in the amount of \$80,808 from the Debtor's cash collateral as generated by tenant monthly rental payments from the Mall Collateral if the parties could agree to terms and conditions to be entered into an Agreed Order.

BACKGROUND

14. On or about December 22, 2005, the Debtor made and executed and delivered to Branch Banking and Trust Company a purchase money promissory note and related loan documents wherein the Debtor borrowed \$15,700,000.00 (as amended, modified, restated, and/or supplemented, "Note"). The purchase money loan evidenced by the Note (as amended, enlarged, extended, modified, rearranged, renewed, restated, restructured, and/or supplemented, "Loan") is secured principally by a first (1st) priority purchase money credit line deed of trust and security agreement dated December 22, 2005, recorded in the Marion County Clerk's Office in Trust Deed Book 854 at Page 919 (as amended, modified, restated, and/or supplemented, "Deed of Trust"), and related assignment of leases and rents dated December 22, 2005, recorded in the Marion County Clerk's Office in Assignment Book 29, at Page 120 (as amended, modified, restated, and/or supplemented, "Assignment"), encumbering the Mall Collateral. The Note, the Deed of Trust, the Assignment, and related loan documents were subsequently assigned to General Acquisitions by Branch Banking and Trust Company in September of 2016.

15. Beginning in 2006, the Note and certain of the related loan documents

were amended, modified, and/or restated on several occasions and the Loan was further the subject of multiple forbearance agreements. Most recently, the Note and certain of the related loan documents were amended, modified, and/or restated by the Third Restated Modification Agreement dated September 30, 2016 ("Third Modification").

16. Among other things, the Third Modification required Debtor to make monthly payments of \$82,000.00 and extended the maturity date of the Loan until January 15, 2017.

17. Pursuant to maturity of the Loan, and General Acquisitions' argument of defaults by the Debtor under the Third Modification, the Deed of Trust, and the Assignment, and General Acquisitions' argument that the Debtor frustrated General Acquisitions' efforts to collect and receive the rental income generated by the Mall Collateral, a foreclosure sale was set for June 8, 2017, which was cancelled as a result of the filing of this case.

18. Following the maturity of the Loan on January 15, 2017, General Acquisitions exercised its rights under the Assignment by making pre-petition demands that the tenants of the Mall Collateral remit their rental payments to General Acquisitions. Upon information and belief, as contained in the Debtor's Motion to Use Cash Collateral, the total monthly rental payments generated by the Mall Collateral are approximately \$122,000.00 ("Cash Collateral").

19. Accordingly, at the present time, General Acquisitions concurs with the Debtor's calculation that a monthly payment of \$80,808.00 from the Cash Collateral would provide adequate protection. The Third Modification provided that prior to the maturity of the Loan, the Debtor would make monthly payments of \$82,000.00 to

General Acquisitions. Further, prior to the maturity of the Loan, the Third Modification provided that the non-default interest rate applicable to the Loan would be 8.06%.

20. Thereby, the Debtor seeks to provide General Acquisitions with adequate protection of its interest from the Cash Collateral in accordance with 11 U.S.C. §§ 361 and 363.

ACCORDINGLY, based upon mature consideration and review of the Debtor's Motion for Use of Cash Collateral, General Acquisitions' Partial Objection, the arguments of counsel, and receiving no other objections to the Debtor's Motion to Use Cash Collateral, the Court hereby **FINDS** that this Agreed Order is in the best interests of the Debtor.

Upon the consideration of which, it is hereby:

ADEQUATE PROTECTION PAYMENT

ORDERED that beginning on July 1, 2017, the Debtor shall pay to General Acquisitions monthly adequate protection payments equal to interest-only payments at the non-default interest rate of \$80,808 per month, payable on the first (1st) day of each month. Failure to make a timely payment shall constitute an Event of Default (as subsequently defined) and permit General Acquisitions to file a motion with this Court on an emergency basis to set aside this Agreed Order or any other Cash Collateral Order entered.

The parties agree that only for the July 1, 2017, adequate protection payment the Debtor shall not be declared in default unless the full \$80,808 is not paid to General Acquisitions by July 31, 2017. The parties recognize that due to the timing of the entry of this Agreed Order, notice being provided to tenants of the Mall Collateral to send monthly

rental payments to the Debtor and not to General Acquisitions, and the current cash flow position of the Debtor, the Debtor will not have cash on hand to make a full adequate protection payment on July 1, 2017. Therefore, the parties agree that any rental payments made by the tenants of the Mall Collateral that are received by General Acquisitions during the month of July 2017 shall be retained by General Acquisitions and credited to the Debtor's adequate protection payment due and payable on July 1, 2017, with any deficient balance of the adequate protection payment otherwise due and payable on July 1, 2017, being the sole obligation of the Debtor to pay before July 31, 2017. The parties agree that if General Acquisitions receives more than \$80,808 in rental monies from tenants of the Mall Collateral during the month of July 2017 those excess funds shall be turned over to the Debtor immediately as those monies represent Cash Collateral the Debtor needs to operate.

Any notices sent shall be deemed sufficient if mailed by regular First Class Mail, postage prepaid, addressed as follows:

To the Debtor:

Pin Oak Properties, LLC
3120 Fairway Drive
Morgantown, WV 26508

To the Debtor's Counsel:

David M. Jecklin, Esquire
Gianola Barnum Bechtel & Jecklin, L.C.
1714 Mileground
Morgantown, WV 26505

and it is hereby further

USE OF CASH COLLATERAL

ORDERED that the Debtor is authorized to use the Cash Collateral until the

occurrence of an Event of Default, for the maintenance and preservation of its assets and the continued operation of its business, but such use shall be only in the ordinary course of the Debtor's business. Accordingly, the Debtor may receive the monthly rental payments from the tenants at the Mall Collateral as Cash Collateral and request that the tenants make the payments directly to the Debtor. Furthermore, other than the adequate protection payments provided for in this Agreed Order, the Debtor shall not pay any debts arising prior to the Petition Date without the prior approval by this Court in the form of an order, and no expenditures shall be made without providing to counsel for General Acquisitions ten (10) days' advance notice of such proposed expenditures.

STATUTORY RIGHTS UNDER 11 U.S.C. § 507(b)

It is further **ORDERED** that, to the extent the adequate protection provided for herein proves insufficient to protect General Acquisitions' interest in and to the Cash Collateral, General Acquisitions shall have a super-priority administrative expense claim, pursuant to 11 U.S.C. § 507(b), senior to any and all claims against the Debtor under 11 U.S.C. § 507(a), including any amounts borrowed and owed under any debtor-in-possession financing agreement.

PERIODIC REPORTS

It is further **ORDERED** that, as additional adequate protection to General Acquisitions, in addition to remaining current on monthly operating reports, the Debtor shall provide, on a monthly basis, a rolling 13 week cash flow budget reasonably acceptable to General Acquisitions ("Budget"). Additionally, the Debtor shall provide a report every other week comparing actual results to the Budget. Such reports shall be due on Thursday for the period ending the prior Sunday. The reports shall also provide a

written explanation for any Budget line where the actual results show more than a 7% deviation from the Budget.

RIGHTS OF INSPECTION AND AUDIT

It is further **ORDERED** that, as additional adequate protection to General Acquisitions, upon reasonable notice by General Acquisitions, and not more often than once every two (2) months, at General Acquisitions' expense, the Debtor shall permit General Acquisitions, and any of its agents, reasonable and free access to the Debtor's records and place of business during normal business hours to: (i) verify the condition of General Acquisitions' collateral, (ii) conduct an appraisal of the collateral, (iii) inspect, audit, and make copies of the Debtor's books and records, and (iv) conduct environmental testing with respect to the collateral, if necessary.

It is further **ORDERED** that the provisions of this Agreed Order shall be binding upon the Debtor and its respective successors and assigns, including any trustee hereafter appointed as representative of the Debtor's estate, whether under Chapter 11 or any subsequent Chapter 7 case, and shall inure to the benefit of General Acquisitions and its respective successors and assigns; and it is hereby further,

ORDERED that the failure of the Debtor to perform any of the provisions of this Agreed Order then General Acquisitions may, within its sole discretion, file a notice with this Court declaring that the Debtor is in default ("Event of Default"); if the Event of Default has not been cured by the Debtor within 5 days after the filing of the notice with this Court then General Acquisitions may submit an order to this Court lifting the automatic stay, which order this Court may enter without further notice or opportunity for a hearing.

ORDERED that upon the occurrence of an Event of Default and Court order lifting

the automatic stay, General Acquisitions shall have the right to notify tenants at the Mall Collateral to submit all future monthly rental payments to it and not to the Debtor; and it is further

ORDERED that nothing herein shall be deemed to prejudice or waive the rights of General Acquisitions to request additional or further protection, including, without limitation, additional requests for adequate protection payments and requests for modification of the automatic stay with respect to said property, to move for the appointment of a trustee or examiner for the Debtor, or to request any other relief in this case, including, but not limited to, conversion of the case to a liquidation.

SUBMITTED BY:

s/ David M. Jecklin
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